Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-238

LEROY CALLAHAN,
Petitioner,

v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LEROY CALLAHAN,
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v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Leroy Callahan respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on May 16, 1975, affirming a judgment of the United States District Court for the Southern District of Mississippi.[1]

OPINIONS BELOW

The initial opinion of the Court of Appeals, rendered December 13, 1974, and attached as Appendix A *infra*,

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[1] Respondents are the Superintendent of Education of Leake County, H. M. Price; the Leake County Board of Education; and board members J. Palmer Brantley, J. M. Blocker, John Calvin, Smith, Mrs. Loutrelle Stribling and R. T. Trippe.

is reported at 505 F.2d 83. The opinion of the Court of Appeals on petition for rehearing (May 16, 1975, App. B) is reported at 513 F.2d 51. The district court's findings are embodied in its unreported judgment dated August 22, 1973 (App. D).

JURISDICTION

A timely petition for rehearing and suggestion for rehearing en banc was denied on May 16, 1974.[2] The judgment of the Court of Appeals was entered on May 16, 1975, and its mandate issued on May 27, 1975 (App. C). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1970).

QUESTION PRESENTED

Whether the First and Fourteenth Amendments and 42 U.S.C. § 1983 prohibit a school board from discharging a principal for the sole reason that there was community opposition to the principal, when that opposition was based in part on racial hostility and opposition to the principal's implementation of court-ordered desegregation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

[2] Petitioner's time for filing a petition for rehearing and suggestion for rehearing en banc was extended until January 17, 1975.

U.S. Constitution, Amendment XIV:

> "* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. § 1983 (1970):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner is a white educator who was employed by the Leake County School District of Mississippi as a principal for the academic years 1970-71 through 1972-73.[3] During this period the Leake County School District was in the throes of desegregation, as mandated by this Court[4] and ordered by the Fifth Circuit.[5] The Superintendent of Leake County Schools determined to terminate petitioner's employment effective at the conclusion of the 1972-73 academic year for the sole reason that there was community opposition to petitioner (App. A

[3] Petitioner was employed for seven years as an assistant principal in the Leake County Schools before becoming a principal.

[4] *Brown* v. *Board of Education*, 349 U.S. 294 (1955); *Alexander* v. *Board of Education*, 396 U.S. 19 (1969); *Carter* v. *West Feliciana School Board*, 396 U.S. 290 (1970).

[5] *United States* v. *Hinds County School Board*, 417 F.2d 852 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970) (the Leake County School Board was an appellee in this action).

infra, at 8a).[6] The record shows, as the Fifth Circuit confirmed, that some of this community opposition to petitioner "was racially motivated" (App. A *infra*, at 8a) and that the community's opposition "was exacerbated by his [petitioner's] activities in relation to the black students" in his school (App. B *infra*, at 13a).

The chronology of events leading to petitioner's discharge was described by the Fifth Circuit as follows. In January 1970, the Edinburg Attendance Center admitted its first black students pursuant to court order (App. A *infra*, at 3a). At this time white students attempted to "'run off'" the black teachers who were also transferred to the Attendance Center (*id.* at 3a). Petitioner became principal of the Attendance Center beginning with the 1970-71 academic year and supported these black teachers (*id*; H. 145).[7]

In 1971-72, petitioner failed to recommend for reemployment in 1972-73 a popular white football coach, thus causing some community opposition to petitioner (App. A *infra*, at 4a).[8] Notwithstanding this opposition, petitioner's employment for 1972-73 was continued (*id.*).

During the fall months of the 1972-73 school year the following events occurred, as described by the Court:[9]

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[6] The superintendent testified that petitioner is "very capable and qualified to run a school" and that petitioner's employment would have been continued in the absence of community opposition (School Board Transcript, pp. 17, 25).

[7] Citations of this form refer to the transcript of the school board hearing in this case. The transcript of the district court hearing is cited as "Tr. ——."

[8] Petitioner did not recommend the coach for reemployment on grounds that the coach was pilfering funds and merchandise from the school store (Tr. 144-46).

[9] In addition to the facts mentioned in the Fifth Circuit's opinions, the record shows that on approximately November 30, 1972, the Chairman of the Leake County School Board instructed petitioner to strip a black coach of his duties (Tr. 52-55, 119-20, 190-92). Petitioner declined, stating that he would only do this on written instruction from the board (Tr. 120, 55).

"(1) [Petitioner began] placing blacks on cheerleader squad in representative numbers;

"(2) [Petitioner began] allowing blacks to participate fully in homecoming and fund raising activities [which included having a black king and queen of homecoming, as well as a white king and queen[10]];

"(3) [Petitioner began] placing blacks on local board of trustees;

"(4) [Petitioner] referred to in derogatory terms;[11]

"(5) Signs [bearing the legend KKK] painted along the route [petitioner] traveled to his farm;

"(6) Occasional threats passed along to [petitioner], his friends and supporters."[12] (App. B *infra*, at 11a-12a).

On January 16, 1973, petitions, purportedly signed by 148 persons, were presented to the Leake County Board of Education, urging that petitioner be removed from office (H. 12).[13] Two days later, on January 18, 1973, the superintendent advised petitioner that he would not be rehired for the 1973-74 academic year because the "tensions are so high among patrons, teachers and students" (App. A *infra*, at 5a).

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[10] H. 146-48; Tr. 169-71.

[11] For example, petitioner and his supporters were referred to as "nigger-loving son-of-a-bitches" (H. 188, 193).

[12] For example, the dog of one of Callahan's black coaches was shot and a note was left inside the coach's door saying, "You are next, K.K.K." (Tr. 122.)

[13] Additional petitions were presented in March 1973 (H. 12).

Petitioner initiated an action in the United States District Court for the Southern District of Mississippi under 42 U.S.C. § 1983 (1970) and 28 U.S.C. §§ 1331 and 1343(3) (1970), alleging that the community opposition to him was racially inspired. Specifically, petitioner alleged that the community opposition was based upon the steps he took to comply with the letter and spirit of the Fifth Circuit's decree requiring desegregation. The school board moved for leave to afford a timely hearing to the petitioner upon the allegations set out in his complaint, and the district court ordered the school district to afford petitioner such a hearing.

Following a hearing, the board issued, on July 2, 1973, an opinion approving the superintendent's decision to terminate petitioner at the conclusion of the academic year 1972-73. It found:

> "There was and is substantial opposition among the parents of children attending the Edinburg Attendance Center to the reemployment of Mr. Leroy Callahan * * *. [T]here is very little, if any, racial hostility in the Edinburg School community directed toward Mr. Leroy Callahan; and * * * this was not a factor in the decision [of the superintendent] not to recommend Mr. Leroy Callahan as attendance center principal.
>
> "[T]he administration of Edinburg Attendance Center by Mr. Leroy Callahan on a fully unitary non-discriminatory basis was not the reason for substantial opposition to Mr. Callahan * * *." (App. G *infra* at 26a-27a.)

Two members of the five-member board dissented from the board's decision.

Petitioner returned to the district court on motion for preliminary injunction, consolidated for hearing with trial on the merits. That court received in evidence the record made before the board and heard further testimony. On August 22, 1973, the district court, *per* Judge Nixon, entered a four-page judgment against petitioner (App. D *infra*), stating that the court

> "finds and is of the opinion that the decision not to re-employ the plaintiff as principal of the Edinburg Attendance Center for the scholastic year 1973-74 was not based on any constitutionally impermissible ground but solely upon the determination by the Superintendent of Education of Leake County, Mississippi, Mr. H. M. Price, that there was in fact substantial opposition among the parents of students attending Edinburg Attendance Center to the reemployment of the plaintiff as a school principal and that because of this substantial opposition, his reemployment as school principal would not be in the best interest of public schools at Edinburg Attendance Center." (App. D *infra*, at 17a-18a.)[14]

The district court made no finding that the community opposition to Callahan was free of racial hostility or that the superintendent only relied upon that portion of the community opposition that may have been free of racial motive.

Petitioner appealed. In its first opinion, dated December 13, 1974, the Court of Appeals (*per* Coleman, Clark and Roney, JJ.), stated, "We agree with plaintiff that there was some opposition to him which was racially motivated" (App. A *infra*, at 8a). The court concluded, however, that "[t]he record contains substantial evidence to support the findings that, despite such racially motivated opposition, Superintendent Price's decision not to reemploy Callahan was based on considerations and oppositions unrelated to any efforts of the principal to com-

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[14] By order issued September 27, 1973 (App. E *infra*), the court ordered that its August 22nd judgment be deemed to contain its findings of fact and conclusions of law. Final judgment was entered on October 30, 1973 (App. F *infra*).

ply with court-ordered desegregation" (App. A *infra*, at 8a-9a).

Callahan petitioned for reconsideration on the grounds, *inter alia*, that the court had made material mistakes of chronological fact and sequence. The Fifth Circuit panel, on May 16, 1975, entered a supplemental opinion correcting its mistakes of chronological fact (App. B *infra*).[15] Under its second and "correct view of the facts, the unpopularity because of the run-in with the football coach and other teachers was exacerbated by his activities in relation to the black students." Then, as the court put it: "One hand washes the other. The smooth working operation of a school is of utmost importance to the education of its students, particularly in a school attempting to implement court-ordered desegregation. As we concluded in the original opinion filed in this case, the findings and conclusions of the district court are supported by substantial evidence and are not clearly erroneous." [16] (*Id.* at 13a).

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[15] In its first opinion the Court of Appeals erroneously concluded that petitioner's steps to desegregate his school and the racially inspired opposition to those steps occurred in 1970-71, that petitioner's contract was renewed for 1971-72 notwithstanding the public opposition, and that a new wave of opposition was created in 1971-72 when petitioner determined not to recommend a white football coach for employment (App. A *infra*, at 3a-4a, 8a-9a). In short, the Court of Appeals initially treated the incident with the football coach as a racially neutral intervening cause. Petitioner sought reconsideration because, *inter alia*, while the allegedly neutral events occurred in 1971-72, the events which the panel found gave rise to racially inspired community opposition occurred thereafter in the fall of 1972, shortly before the superintendent decided not to continue petitioner's employment.

[16] The Court of Appeals also said that "we cannot hold to be clearly erroneous the finding of the trial court that, despite the fact that some of the opposition to Callahan was racially motivated, Superintendent Price's decision not to reemploy Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation." (App. B *infra*, at 12a). In fact, however, the district court made no finding respecting the extent to which the community opposition to Callahan was racially inspired or whether the superintendent had been able to separate the racially motivated opposition from that which may have had no racial overtones (App. D *infra*).

REASONS FOR GRANTING THE WRIT

I. The Decision Below Conflicts With Decisions Of This Court And Other Federal Courts.

In the case at bar the superintendent and the board of education terminated petitioner solely because of community opposition to him, and the record and opinions of the Court of Appeals confirm that this community opposition was in part racially motivated. As the Court of Appeals concluded, the community opposition that arose in 1971-72 because of Callahan's effort to terminate a popular football coach "was exacerbated by his activities in relation to black students" in 1972-73, the year in which he was terminated. Thus, the body of sentiment relied upon and indeed implemented by the superintendent and the board of education was infected with racially discriminatory motives and opposition to court-ordered desegregation of the schools.

The decisions of this Court "make clear that the impetus for * * * forbidden discrimination need not originate with the State if it is state action that enforces privately originated discrimination." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 172 (1972). In addition, the decisions of this Court and other federal courts establish that school officials, in making educational and administrative decisions, cannot bow to community pressure which is racially motivated or antagonistic to court-ordered desegregation.

In *Brown* v. *Board of Education*, 349 U.S. 294 (1955) *(Brown II)*, this Court declared that the principles forged in *Brown I* "cannot be allowed to yield simply because of disagreement with them" (*id.* at 300). In

Cooper v. *Aaron*, 358 U.S. 1 (1958), this Court accepted the findings that the school board and superintendent of schools in Little Rock, Arkansas, had displayed "entire good faith" and that "the educational progress of all the students, white and colored," had suffered as a result of the community opposition to desegregation which was generated in substantial part by the executive and legislative branches of the State of Arkansas (*id.* at 15); nonetheless, the Court ordered the school district to carry forward with desegregation of its schools. In a concurring opinion, Mr. Justice Frankfurter stated that "the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding [and this] is especially true when they are confronted with a problem like a racially discriminating public school system" (*id.* at 26).

In *Lucas* v. *Colorado General Assembly*, 377 U.S. 713, 736 n.29 (1964), this Court reiterated the principle that "[n]o plebiscite can legalize an unjust discrimination," quoting *Hall* v. *St. Helena Parish School Bd.*, 197 F. Supp. 649, 659 (E.D. La. 1961), *aff'd*, 368 U.S. 515.

In *United States* v. *School District 151 of Cook County, Illinois*, 404 F.2d 1125 (1968), the Seventh Circuit, on appeal from an order granting plaintiffs preliminary injunctive relief, affirmed findings that a school board's rejection of one proposed desegregation plan was racially discriminatory. "[T]hat rejection, in the district court's finding, was not innocent or based on cost, safety, convenience, or other rational basis, but merely because Negro pupils were Negro—a reflection of the resident hostility" (*id.* at 1133). The court noted that "[t]here is no doubt that Board members were under severe pressure from District residents and that performance of duty was made difficult. But this cannot excuse the unconstitutional conduct justifiably found on this record" (*id.*). After trial on the merits, the district court again found

that "[a] substantial factor in the Board's failure to adopt [the proposed plan in question] was the members' reflection of the community sentiment hostile to the desegregation which would result from that Plan," 301 F. Supp. 201, 217 (N.D. Ill. 1969). The court concluded (*id.* at 230) that a school board may not "permit educational choices to be influenced by a policy of racial segregation in order to accommodate community sentiment or the wishes of a majority of voters," citing *Cooper* v. *Aaron*, *supra*, and *Lucas* v. *Colorado General Assembly*, *supra*. The Court of Appeals affirmed again, with one modification not relevant here. 432 F.2d 1147 (7th Cir. 1970), *cert. denied*, 402 U.S. 943.

In *Dowell* v. *Board of Education of Oklahoma City Pub. Schools*, 338 F. Supp. 1256 (W.D. Okla. 1972), *aff'd*, 465 F.2d 1012 (10th Cir. 1972), *cert. denied*, 409 U.S. 1041, the trial court observed that the school board "rationalizes its intransigence [to a desegregation plan] on the constitutionally unsound basis that public opinion is opposed to any further desegregation" (338 F. Supp. at 1270), and ruled, *inter alia*, that "[t]he fact that public opinion may oppose desegregation of the public schools is not a valid reason for failure to comply with the Constitution" (*id.* at 1272).

A similar principle has been applied in the public housing area. In *Gautreaux* v. *Chicago Housing Authority*, 296 F. Supp. 907, 914 (N.D. Ill. 1969), the district court concluded that "even if [the Chicago] Aldermen's informal surveys were correct in their uniform assessment of public opinion, they cannot acquiesce in the sentiment of their constituents to keep their neighborhoods White and to deny admission to Negroes via the placement of public housing," citing *United States* v. *School District 151 of Cook County, Illinois*, *supra*, 404 F.2d 1125 (7th

Cir. 1968), and *Reitman* v. *Mulkey*, 387 U.S. 369 (1967).[17]

The decision below permits school districts to fire teachers and administrators who are "very capable to run a school" (see note 6, *supra*) solely because of community opposition to them which is based in part on racially discriminatory motives and opposition to court-ordered desegregation. That decision conflicts with the decisions of this Court and other federal courts and should therefore be reviewed.

II. The Decision Below Presents An Important Ruling That Jeopardizes The Employment Of Administrators And Teachers In The Fifth Circuit Who Have Endeavored To Comply With Court Orders Requiring The Establishment And Maintenance Of Unitary Schools.

There are approximately 1,728 school districts in the Fifth Circuit.[18] Many, if not most, of these school districts are now subject to court orders or compliance agreements with the U.S. Department of Health, Education and Welfare, governing the steps that must be taken to establish and maintain a unitary system of public schools.[19] The teachers and administrators in these systems who are endeavoring to comply with court orders and compliance agreements, notwithstanding public opposition, are entitled to protection. If the decision below

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[17] This order was not appealed. A later aspect of the much-litigated *Gautreaux* case—dealing with remedy—is now before this Court in No. 74-1047, *Hills* v. *Gautreaux*, *cert. granted sub nom. Mitchell* v. *Gautreaux*, May 12, 1974, 43 U.S.L.W. 3597.

[18] National Education Association, "Estimates of School Statistics, 1974-75," p. 22.

[19] We are advised by the Education Section of the United States Department of Justice, Civil Rights Division, that the Education Section is participating as plaintiff, plaintiff-intervenor or amicus curiae in cases involving approximately 427 school districts located in the Fifth Circuit.

is allowed to stand, no school official can safely buck community opposition to school desegregation.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

August 14, 1975

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1029

LEROY CALLAHAN,
Plaintiff-Appellant,
v.

H. M. PRICE, *et al.*,
Defendants-Appellees.

Dec. 13, 1974

Before COLEMAN, CLARK and RONEY, Circuit Judges.

RONEY, Circuit Judge:

Leroy Callahan, a white, nontenured school principal in Leake County, Mississippi, after three one-year contracts as principal and seven one-year contracts as assistant principal, was not reemployed for the school year 1973-74. He asserts that the nonrenewal of his contract is violative of his First and Fourteenth Amendment rights to freedom of speech and association and to his right to be free from arbitrary and capricious governmental action. He first claims that the community opposition which triggered the refusal of the Board to rehire him was grounded on his unpopular enforcement of court-ordered desegregation. He then asserts that in any event, community opposition alone, whatever its basis, is an insufficient ground for nonrenewal of his contract absent a showing that the school or his performance as principal is undermined. Finally he argues that nonrenewal under these circumstances makes the governmental ac-

tion arbitrary and capricious, and otherwise violates his constitutional rights.

We affirm the district court's decision, not by deciding the serious legal questions posed by Callahan, but on the ground that the findings of the district court are not clearly erroneous and the facts do not support Callahan's claim that he was dismissed for constitutionally impermissible reasons. The key to any possible relief claimed by plaintiff lies in the reason for the community opposition to him and its effect. In a case of this kind, the burden of proof is on the plaintiff to show that the conduct of the school authorities was unconstitutional.

The facts found by both the school board after extensive hearings, and the district court after evidentiary hearings and examination of the transcript before the school board, show that the plaintiff failed to prove that the community opposition was based on his enforcement of court-ordered desegregation. The record also shows that he failed to prove that the Board was wrong in finding that his nonrenewal was in the best interests of the school and the students.

Callahan brought this action against the Superintendent of Education and the members of the Board of Education of Leake County, Mississippi, pursuant to 42 U.S.C.A. § 1983 and § 2000d and the First and Fourteenth Amendments. He sought injunctive and other relief requiring the defendants to rehire him, to reimburse him all back pay, and to pay him actual and punitive damages.

Throughout the course of this litigation Callahan has argued that his dismissal was based on his stand in favor of compliance with a federal court order requiring integration of Leake County schools. The Superintendent and the Board take the position that the best interests of the school necessitated that Callahan not be rehired because

of community opposition, which resulted primarily from his attempt to remove a popular football coach. This differing interpretation of the underlying reason for the failure to rehire Callahan makes it necessary for us to develop the factual background of this case in detail.

The Edinburg Attendance Center was one of the last schools in Leake County to experience integration, finally admitting its first black student in January 1970 after the ruling of this Court in United States v. Hinds County School Board, 417 F.2d 852 (5th Cir. 1969), cert. denied, 396 U.S. 1032, 90 S.Ct. 612, 24 L.Ed.2d 531 (1970). From the beginning there was difficulty between the white students and the newly arrived black faculty members, described by witnesses as attempts on the part of the white students to "run-off" the black teachers. At the time the school was first integrated Callahan served as an assistant principal, a position which he had occupied for seven years. With the beginning of the 1970-71 school term, Callahan became principal of the Edinburg Attendance Center under the first of three successive one-year written contracts.

According to Callahan, it was at this time that he decided to "back his black teachers" and to comply with both the letter and spirit of the court order unitizing the Leake County school system. He set about to assure equal participation in all of the school's activities by placing blacks on the cheerleader squad in representative numbers, by allowing blacks to participate fully in homecoming and fund raising activities, and by placing blacks on the local board of trustees. These actions incurred the wrath of several of the white patrons of the school. Callahan was referred to in derogatory terms, signs were painted along the route he traveled to his farm each day, and, on occasions, threats were passed along to him and to his friends and supporters.

In spite of this opposition to Callahan he was reemployed for the 1971-72 school term. During this year Callahan's unpopularity was exacerbated by his failure to recommend certain techers for reemployment for the 1972-73 term, particularly a popular football coach and assistant principal, John McCloud. Under the provisions of Section 37-9-17 of the Mississippi Code of 1972, the attendance center principal is given discretion and responsibility to initiate recommendations for teaching personnel within his attendance center. Callahan had accused McCloud of pilfering $5.19 from the school activity fund. McCloud was very popular with the students and in the community. In response to Callahan's action, petitions began to circulate and meetings were held in support of the football coach. Certain students at Edinburg Attendance Center threatened and attempted a walk-out in support of the football coach, but were persuaded to return to their classrooms by McCloud.

McCloud and several of the other teachers not recommended for reemployment requested a hearing before the Board of Education upon the charges asserted against them by Callahan. This request was granted and the Board resolved the charges in favor of the teachers. Both Callahan and McCloud were then requested to appear before the Board which expressed to both its concern that, in view of the circumstances then apparent, it would not be in the best interest of Edinburg Attendance Center for either of them to remain. Neither Callahan nor McCloud chose to resign and the Board subsequently entered into one-year written contracts for the 1972-73 school term with each of them. Thus the 1972-73 school term began at Edinburg Attendance Center with Callahan serving as principal and with McCloud serving as a teacher, instead of assistant principal.

During the fall of 1972, Superintendent Price became aware that this undercurrent of discontent in the Edin-

burg Attendance Center was increasing. Petitions advocating Callahan's removal were circulated and, on occasion, Price and members of the Board had to go to the school in efforts to calm the student body and faculty.

Superintendent Price determined that there was in fact substantial opposition to Callahan and that it would not be in the best interest of the school to recommend Callahan as attendance center principal for the 1973-74 school term. Section 37-9-15 of the Mississippi Code of 1972 gives the Superintendent discretion and responsibility to initiate recommendations for the employment of attendance center principals. Price wrote Callahan a letter on January 18, 1973, advising him that he would not be recommended and giving the reasons for his decision:

> As you know, I am greatly concerned about the educational system of Leake County, including Edinburg Center, it's staff, pupils and patrons.
>
> I have given the situation that exists there very much thought and consideration, and have decided that it is for the best interest of the school and the children that I should not recommend you to the Leake County School Board for re-employment as Principal, after your present contract expires, for the 1973-74 school term.
>
> My reason for not recommending you is that under the conditions that exist at the Edinburg Center, tensions are so high among patrons, teachers and students, that you cannot have the type of school and education that the pupils of the community are entitled to and deserve.
>
> This decision was made entirely for the best interest of the school and for no other reasons.

Callahan then brought this suit in April 1973 at a time when he was still serving as attendance center principal at Edinburg. The defendants immediately obtained from the district court a stay for the purpose of conducting a board hearing. The Board thereupon gave Callahan a full hearing as to the reasons for the nonrenewal of his contract. He was given a statement of the reason for the Superintendent's action, the names and nature of the expected testimony of the witnesses to be called by the Superintendent, and an opportunity to cross-examine the Superintendent's witnesses and to present evidence of his own. It is not questioned that this hearing afforded Callahan all of the procedural due process contemplated by the Fourteenth Amendment. Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); *cf.* Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961).

The Board then filed its findings and conclusions with the district court. The Board was explicit in its findings as to why Callahan was not rehired for the 1973-74 school term:

> There was and is substantial opposition among the parents of children attending the Edinburg Attendance Center to the re-employment of Mr. Leroy Callahan as attendance center principal for the 1973-1974 scholastic year which begins July 1, 1973; and, that this substantial opposition to Mr. Leroy Callahan as attendance center principal is not in the best interests of the public school at Edinburg Attendance Center; and, that these are the two sole reasons why Mr. H. M. Price, as Leake County, Mississippi, Superintendent of Education, did not recommend Mr. Leroy Callahan to the Leake County, Mississippi, Board of Education for the position as attendance center principal at Edinburg Attendance Center for the 1973-1974 scholastic year. We find that there is

> very little, if any, racial hostility in the Edinburg school community directed toward Mr. Leroy Callahan; and, that this was not a factor in the decision of Mr. H. M. Price not to recommend Mr. Leroy Callahan as attendance center principal.
>
> We further find that the administration of Edinburg Attendance Center by Mr. Leroy Callahan on a fully unitary non-discriminatory basis was not the reason for the substantial opposition to Mr. Callahan in the Edinburg Attendance Center community.

Callahan was allowed to complete his contract which expired by its own terms on June 30, 1973.

A school board hearing procedure which is conducted in accordance with the dictates of procedural due process is entitled to great weight. If substantial evidence appears to support the school board's action that should end the matter. The court should never substitute its judgment for that of the Board. Toups v. Authement, 496 F.2d 700 (5th Cir. 1974); Thompson v. Madison County Board of Education, 476 F.2d 676 (5th Cir. 1973). On this appeal, our review is limited to examining the record to ascertain whether there was substantial evidence to support the finding of the Board and the district court that the nonrenewal of Callahan's contract was due to substantial community opposition which was unrelated to his efforts to comply with court-ordered desegregation.

At the Board's hearing, Callahan had the burden of proving that he was not rehired for constitutionally impermissible reasons. Fluker v. Alabama State Board of Education, 441 F.2d 201 (5th Cir. 1971). He attempted to meet the burden by presenting evidence that the Superintendent's decision was based on community opposition resulting from Callahan's full faith compliance with federal court-ordered desegregation. The Superintendent

countered with evidence showing that the decision not to rehire was grounded on community opposition resulting from Callahan's disagreements with football coach McCloud. The Board resolved this conflict in favor of the Superintendent, and like the district court, we agree that there was substantial evidence to support its findings.

In its report to the district court the Board noted that it had not

> . . . attempted to analyze the testimony of each witness and find separately findings of fact as to the testimony of each witness. There were numerous witnesses in this lengthy hearing and much of the testimony was contradictory in nature. This simply points up and emphasizes our finding that there is substantial opposition to Mr. Callahan in the Edinburg school community and that Mr. Callahan is the center of the controversy.

Likewise we do not feel it would be helpful, or that it is necessary, to pull from the record testimony supporting the Board's and district court's findings. We agree with plaintiff that there was some opposition to him which was racially motivated. Considering that the Edinburg Attendance Center was first integrated in 1970, this opposition was not surprising or unusual. There had been such opposition since Callahan became principal in 1970, yet this opposition did not prevent Superintendent Price from recommending that Callahan be reemployed in 1971 and in 1972. It was only after the McCloud controversy in the spring and fall of 1972 that Price decided the community opposition to Callahan was such that it would not be in the best interest of the school for Callahan to be reemployed for the 1973-74 school term. The record contains substantial evidence to support the findings that, despite such racially motivated opposition, Superintendent Price's decision not to reemploy Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation.

Plaintiff simply failed to satisfy his burden of proving that the community opposition and the Superintendent's decision not to reemploy him was due to his interest in maintaining an integrated school. On appeal, plaintiff contends that even if this be so, the Superintendent's decision was arbitrary and capricious and in violation of the Fourteenth Amendment absent a showing that his performance as principal of Edinburg Attendance Center was undermined as a result of the opposition. He points to a good and improved school record during his principalship. Callahan argues that there was no showing that the opposition had any effect on his ability to run the school and therefore, defendants' decision that he not be rehired was wholly unsubstantiated and ran afoul of his right to substantive due process. Unless plaintiff can show that the nonrenewal of his contract was for a constitutionally impermissible reason, however, there is no basis for us to invalidate the Superintendent's action. The finding by the Board that it was not in the best interest of the school to rehire Callahan removes from the decision the arbitrary and capricious characteristics asserted by plaintiff. We have continually reiterated the view that matters of school policy are best resolved in the local community and within the institutional framework of the school system. Ferguson v. Thomas, *supra*. The findings and conclusions of the district court are supported by substantial evidence and are not clearly erroneous under F.R.Civ.P. 52(a).

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 74-1029

LEROY CALLAHAN,
Plaintiff-Appellant,

v.

H. M. PRICE, *et al.*,
Defendants-Appellees.

May 16, 1975

* * * *

Appeal from the United States District Court for the Southern District of Mississippi.

ON PETITION FOR REHEARING

(Opinion December 13, 1974, 5 Cir. 1974, 505 F.2d 83.)

Before COLEMAN, CLARK and RONEY, Circuit Judges.

PER CURIAM:

In the petition for rehearing it is asserted that the panel misapprehended the chronology of some of the facts in this case. The response to the petition concedes the point. The mistakes reflected in the panel opinion occurred through dependence upon the appellant's brief for a recitation of the facts. The facts were not there set forth in chronological order. The chronology apparently seemed of no particular importance to the appellant, except on petition for rehearing. We conclude that the exact chronology is of no decisional consequence. The hearings before the school board were extensive and involved numerous witnesses with continual switching of time frame in questions and answers. The evidentiary hearing before the district court was partially repetitious of facts covered in the hearings before the Board.

The parties now agree that the following portion of the panel opinion, 505 F.2d at 85, is chronologically incorrect in that these events did not occur during the 1970-71 year as indicated in the paragraph immediately preceding the following quotation:

> He set about to assure equal participation in all of the school's activities by placing blacks on the cheerleader squad in representative numbers, by allowing blacks to participate fully in homecoming and fund raising activities, and by placing blacks on the local board of trustees. These actions incurred the wrath of several of the white patrons of the school. Callahan was referred to in derogatory terms, signs were painted along the route he traveled to his farm each day, and, on occasions, threats were passed along to him and to his friends and supporters.
>
> In spite of this opposition to Callahan he was reemployed for the 1971-72 school term.

The following events occurred during the fall months of the 1972-73 school year, *after* rather than *before* the run-in with the popular football coach in the 1971-72 school year:

> (1) Placing blacks on cheerleader squad in representative numbers;
>
> (2) Allowing blacks to participate fully in homecoming and fund raising activities;

(3) Placing blacks on local board of trustees;

(4) Callahan referred to in derogatory terms;

(5) Signs painted along the route Callahan traveled to his farm;

(6) Occasional threats passed along to Callahan, his friends and supporters.

The panel opinion is in apparent error also for indicating that Superintendent Price recommended Callahan for reemployment in 1971 and 1972. He was in fact recommended for these two terms of employment by the Leake County superintendent of education, the predecessor to Superintendent Price, who did not take office until January 1972. Superintendent Price then recommended Callahan for reemployment for the 1972-73 school term. This recommendation was made in January 1972. At that time Price testified that he was unaware of any opposition to Callahan, which "bloomed out" later in the spring of 1972 when petitioner Callahan failed to recommend football coach Johnny McCloud and three other teachers for rehiring for the school year 1972-73.

A review of the record convinces us, however, that the facts, when correctly apprehended, although not as strong as originally recited in the panel opinion, nevertheless support the conclusion that we cannot hold to be clearly erroneous the finding of the trial court that, despite the fact that some of the opposition to Callahan was racially motivated, Superintendent Price's decision not to reemploy Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation. Although the original panel opinion may have misapprehended the correct chronology, the district court did not. In the view of the panel, on the first chronology, Callahan's unpopularity because of his racial activities was exacerbated by the Coach McCloud incident and the failure

to recommend him for reemployment. In the correct view of the facts, the unpopularity because of the run-in with the football coach and other teachers was exacerbated by his activities in relation to the black students. One hand washes the other. The smooth working operation of a school is of utmost importance to the education of its students, particularly in a school attempting to implement court-ordered desegregation. As we concluded in the original opinion filed in this case, the findings and conclusions of the district court are supported by substantial evidence and are not clearly erroneous under F.R.Civ.P. 52(a).

The petition for rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1029

D.C. Docket No. CA-73-J-74 "N"

LEROY CALLAHAN,
Plaintiff-Appellant,

versus

H. M. PRICE, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Mississippi

Before COLEMAN, CLARK and RONEY, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

December 13, 1974

Issued as Mandate: May 27, 1975

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 73J-74(N)

LEROY CALLAHAN,
Plaintiff

vs.

H. M. PRICE, THE LEAKE COUNTY,
MISSISSIPPI BOARD OF EDUCATION, *et al.*,
Defendants

JUDGMENT

This cause came on for hearing before the Court on July 10, 1973 on Motion of the plaintiff, Leroy Callahan, for a Preliminary Injunction against the defendants herein alleging that his contract of employment as principal of the Edinburg Attendance Center, Leake County, Mississippi, was arbitrarily and capriciously terminated and "for the unlawful reason that he vigorously enforced Court ordered desegregation at his school". The plaintiff alleges violations of the due process and equal protection clause of the Fourteenth Amendment to the Constitution of the United States and seeks, inter alia, preliminary and permanent injunctions requiring defendants to offer him a contract of employment as principal of Edinburg Attendance Center for the 1973-74 school year and thereafter under the same terms and conditions as contracts offered to other principals in this school district and heretofore offered the plaintiff in previous years, for reinbursement of all back-pay and other allowances and privileges lost by him, and for actual and punitive damages in the amount of $2,000.00.

This Court entered an order on May 14, 1973, directing the defendant Board of Education to hold a hearing in this matter and requiring that all pleadings be held in abeyance pending this hearing and a subsequent issuance of findings and conclusions by the Board. This hearing was held on May 29, 1973, and Findings and Conclusions of the Leake County, Mississippi, Board of Education were filed herein on July 9, 1973.

On June 28, 1973 this Court entered a Temporary Restraining Order prohibiting defendants from evicting the plaintiff from his present residence, which is owned by the Leake County School District, and further maintaining the status quo until the hearing on plaintiff's Motion for a Preliminary Injunction could be heard on Tuesday, July 10, 1973. Pursuant to Rule 65(a)(2), F.R.C.P., and with the consent of all parties, this Court ordered the trial of this action on the merits advanced and consolidated with the hearing of the application for preliminary injunction.

This Court, having carefully examined all the evidence in this case, including the transcript of the hearing before the Leake County Board of Education, the Findings and Conclusions of this Board and the testimony of the witnesses appearing at the hearing held in this matter on July 10, 1973, finds and is of the opinion that the decision not to re-employ the plaintiff as principal of the Edinburg Attendance Center for the scholastic year 1973-1974 was not based on any constitutionally impermissible ground but solely upon the determination by the Superintendent of Education of Leake County, Mississippi, Mr. H. M. Price, that there was in fact substantial opposition among the parents of students attending Edinburg Attendance Center to the re-employment of the plaintiff as school principal and that because of this substantial opposition, his re-employment as school principal would not be in the best interest of public schools at Edin-

burg Attendance Center. The Court finds that in failing to favorably recommend to the Leake County Board of Education the renewal of the plaintiff's contract, Superintendent Price was exercising the authority given to him under Mississippi law and that the decision not to rehire the plaintiff was not arbitrary or capricious.

Furthermore, this Court finds that although there was no due process requirement that the plaintiff be afforded a hearing by the Board inasmuch as he had no legitimate claim or entitlement to renewal of his contract but merely a unilateral or subjective expectation thereof, *Board of Regents* v. *Roth*, 408 U.S. 564 (1972), nevertheless, he was afforded a hearing before the Board of Education, as ordered by this Court, and this hearing afforded him all procedural due process contemplated by the Fourteenth Amendment.

Accordingly, it is the finding of this Court that the plaintiff is not entitled to a preliminary or permanent injunction requiring his re-employment, damages, attorney's fees or any other relief requested. Because it was necessary that a determination be made in this matter prior to the beginning of the school year this Court deems it appropriate that the Judgment be entered in this case at this time. Formal Findings of Fact and Conclusions of Law will be filed by the Court at a subsequent date.

Accordingly, it is hereby Ordered and Adjudged that the plaintiff herein, Leroy Callahan, be denied the relief sought, that the action be dismissed with prejudice and that the plaintiff and defendants each bear their own costs.

ORDERED AND ADJUDGED this 22nd day of August, 1973.

Biloxi, Mississippi

/s/ Walter L. Nixon, J.
WALTER L. NIXON, J.
United States District Judge

[Filed: August 22, 1973]

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 73J-74(N)

LEROY CALLAHAN,
Plaintiff

vs.

H. M. PRICE, THE LEAKE COUNTY,
MISSISSIPPI BOARD OF EDUCATION, *et al.*,
Defendants

ORDER ON FINDINGS OF FACT
AND CONCLUSIONS OF LAW

This cause came on for hearing before the Court on July 10, 1973, on Motion of the plaintiff for a Preliminary Injunction, the trial of this action on the merits having been advanced and consolidated with the preliminary injunction hearing. On August 22, 1973, this Court entered a four page Judgment in which the relief sought by the plaintiff, Leroy Callahan, was denied and the action was dismissed with prejudice. Although this Court indicated in this Judgment that formal findings of fact and conclusions of law would be filed at a subsequent date, this Court is of the opinion that the Judgment sufficiently sets forth the Court's findings of fact and conclusions of law.

Accordingly, the Judgment entered herein on August 22, 1973, containing this Court's factual findings and legal conclusions, shall be considered the Findings of Fact and Conclusions of Law of this Court.

ORDERED this the 27th day of September, 1973.

/s/ Walter L. Nixon, Jr.
United States District Judge

Biloxi, Mississippi

[Filed: October 4, 1973]

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

Civil Action No. 73J-74(N)

LEROY CALLAHAN,
Plaintiff

vs.

H. M. PRICE, THE LEAKE COUNTY, MISSISSIPPI BOARD OF EDUCATION, *et al.*,
Defendants

JUDGMENT

This cause came on for hearing before the Court on Motion of Plaintiff, Leroy Callahan, for a Preliminary Injunction, the trial on the merits having been advanced and consolidated with the hearing of the Application for a Preliminary Injunction.

Pursuant to the decision of the Court, entered August 22, 1973, and adopted herein by reference, in which this Court determined that the decision not to re-employ the Plaintiff as Principal of the Edinburg Attendance Center, Leake County, Mississippi, was not based on any constitutionally impermissible ground, that the Superintendent of Education was properly exercising the authority given them under Mississippi law and that the hearing before the Board of Education afforded the Plaintiff all procedural due process contemplated by the Fourteenth Amendment, and pursuant to the explanatory Orders of this Court entered October 4, 1973, and this date, it is hereby Ordered and Adjudged that the Plaintiff, Leroy Callahan, be denied the relief sought, that the

action be dismissed with prejudice and that the Plaintiff and Defendants each bear their own costs.

ORDERED AND ADJUDGED this 30th day of October, 1973.

/s/ Walter L. Nixon, Jr.
United States District Judge

Jackson, Mississippi

[Filed: October 30, 1973]

APPENDIX G

REPORT TO THE DISTRICT COURT OF THE FINDINGS AND CONCLUSIONS OF THE LEAKE COUNTY, MISSISSIPPI, BOARD OF EDUCATION

Pursuant to the written order of this Court dated May 14, 1973, directing that the Leake County, Mississippi, Board of Education afford the Plaintiff a timely hearing in accordance with all due process requirements on the question of the reasons for the failure of the Leake County, Mississippi, Board of Education to offer Leroy Callahan a contract of employment as attendance center principal for the 1973-1974 scholastic year, the Leake County, Mississippi, Board of Education caused written notice to be given to Mr. Fred L. Banks, Jr., attorney for the Plaintiff, Leroy Callahan, of an open meeting of the Leake County, Mississippi, Board of Education commencing at 9:00 o'clock A.M. on Tuesday, May 29, 1973, in the Circuit Court Room in the Leake County, Mississippi. The Leake County, Mississippi, Superintendent of Education gave written statement of the charges supporting his failure to recommend Leroy Callahan to the Leake County, Mississippi, Board of Education for the position of attendance center principal at the Edinburg Attendance Center for the 1973-1974 scholastic year together with a list of the witnesses proposed to be called in support of the charges and a summary of the expected testimony of the several witnesses.

The Leake County, Mississippi, Superintendent of Education stated and charged that he did not recommend Leroy Callahan to the Leake County, Mississippi, Board of Education for employment as attendance center principal of the Edinburg Attendance Center for the 1973-1974 scholastic year for the following reasons:

(a) There is overwhelming opposition by the people living within the geographic area served by the Edinburg

Attendance Center to the re-employment of the Plaintiff as attendance center principal; and,

(b) Considering this overwhelming opposition, the employment of the Plaintiff as attendance center principal would not be in the best interests of public schools at Edinburg Attendance Center.

The hearing was convened at the appointed hour on the date and at the place stated and the Board caused the proceedings to be taken in shorthand by a court reporter and subsequently transcribed.

After hearing and considering the oral testimony of the witnesses offered by the Leake County, Mississippi, Superintendent of Education and by Mr. Leroy Callahan together with documentary evidence introduced during the hearing, the Leake County, Mississippi, Board of Education finds therefrom the following findings and conclusions, to-wit:

FINDINGS OF FACT

Mr. Leroy Callahan was employed by the Leake County, Mississippi, Board of Education as attendance center principal for the Edinburg Attendance Center for three (3) successive one (1) year each written contracts commencing with the 1970-1971 scholastic year and ending with the 1972-1973 scholastic year. The most recent contract has been fully performed by both the Leake County, Mississippi, Board of Education and by Leroy Callahan and it has expired by its own terms on June 30, 1973. This was a written contract and contained no provisions for renewal within the contract. Mr. H. M. Price is the Leake County, Mississippi, Superintendent of Education and he was elected by popular vote of the electors of Leake County, Mississippi, and took office in January, 1972, and his term of office is for four (4) years. The

Leake County, Mississippi, school district is a county wide school district encompassing the entire area of Leake County, Mississippi.

Section 6282-05 of the Mississippi Code of 1942 Annotated requires the county superintendent of education to submit to the Board of education between January 15 and February 15 of each year his recommendations for the position of attendance center principal at the several attendance centers within the district; and, in accordance with state law Mr. H. M. Price did submit his recommendation to the Leake County, Mississippi, Board of Education that Mr. Leroy Callahan be appointed attendance center principal of the Edinburg Attendance Center for the scholastic year 1972-1973. The Leake County, Mississippi, Board of Education accepted this recommendation and thereafter approved the appointment of Mr. Leroy Callahan as attendance center principal at the Edinburg Attendance Center for the 1972-1973 scholastic year which ended on June 30, 1973. Mr. H. M. Price, as Leake County, Mississippi, Superintendent of Education, in the exercise of his professional judgment and discretion, did not recommend Mr. Leroy Callahan for the position of attendance center principal at the Edinburg Attendance Center for the scholastic year 1973-1974 that commences on July 1, 1973.

There was and is substantial opposition among the parents of children attending the Edinburg Attendance Center to the re-employment of Mr. Leroy Callahan as attendance center principal for the 1973-1974 scholastic year which begins July 1, 1973; and, that this substantial opposition to Mr. Leroy Callahan as attendance center principal is not in the best interests of the public school at Edinburg Attendance Center; and, that these are the two sole reasons why Mr. H. M. Price, as Leake County, Mississippi, Superintendent of Education, did not recommend Mr. Leroy Callahan to the Leake County,

Mississippi, Board of Education for the position as attendance center principal at Edinburg Attendance Center for the 1973-1974 scholastic year. We find that there is very little, if any, racial hostility in the Edinburg school community directed toward Mr. Leroy Callahan; and, that this was not a factor in the decision of Mr. H. M. Price not to recommend Mr. Leroy Callahan as attendance center principal.

We further find that the administration of Edinburg Attendance Center by Mr. Leroy Callahan on a fully unitary non-discriminatory basis was not the reason for the substantial opposition to Mr. Callahan in the Edinburg Attendance Center community.

We have not attempted to analyze the testimony of each witness and find separately findings of fact as to the testimony of each witness. There were numerous witnesses in this lengthy hearing and much of the testimony was contradictory in nature. This simply points up and emphasizes our finding that there is substantial opposition to Mr. Callahan in the Edinburg school community and that Mr. Callahan is the center of the controversy.

CONCLUSIONS

Based upon the findings of fact set forth above, the Leake County, Mississippi, Board of Education concludes that under the statutory law of the State of Mississippi that is contained in Section 6282-05 of the Mississippi Code of 1942 Annotated, it became the sole duty and responsibility of Mr. H. M. Price as Leake County, Mississippi, Superintendent of Education, within his sole professional judgment and discretion, to make a recommendation to the Leake County, Mississippi, Board of Education of his nominee for the position of attendance center principal at the Edinburg Attendance Center for the 1973-1974 scholastic year; that both the statutory

duty of the superintendent of education and the policy of this school district is that each year the superintendent of education must exercise his own independent professional judgment and discretion in the selection of and the recommendation of a nominee for the Edinburg Attendance Center principal's position; that in the independent exercise of his professional judgment and discretion Mr. H. M. Price, as Leake County, Mississippi, Superintendent of Education, did not recommend Mr. Leroy Callahan for employment as attendance center principal for the Edinburg Attendance Center for the scholastic year 1973-1974; that this action of Mr. H. M. Price in not recommending Mr. Callahan for the 1973-1974 scholastic year was justified under the facts we have found and his action was not arbitrary or capricious; that Mr. H. M. Price, as Leake County, Mississippi, Superintendent of Education, under the facts we have found, acted reasonably in his decision not to recommend Mr. Callahan for employment as Edinburg Attendance Center principal for the scholastic year 1973-1974; and, that there were no other reasons that prompted the action of Mr. H. M. Price.

Respectfully submitted on this the 2nd day of July, 1973.

THE LEAKE COUNTY, MISSISSIPPI,
BOARD OF EDUCATION

By: /s/ J. Palmer Brantley
President

ATTEST:

/s/ H. M. Price
Secretary

[Filed: July 9, 1973]

Supreme Court, U. S.
FILED
SEP 29 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-238

LEROY CALLAHAN,

Petitioner,

v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1975

No. 75-238

LEROY CALLAHAN,

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v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Come now the Superintendent of Education of Leake County, Mississippi; the Leake County, Mississippi, Board of Education; and, the board members, J. Palmer Brantley, J. M. Blocker, John Calvin Smith, Mrs. Loutrelle Stribling and R. T. Trippe; hereinafter referred to as respondents; and, file their brief in opposition to the petition of Leroy Callahan for writ of certiorari to the

United States Court of Appeals for the Fifth Circuit.

The respondents are opposed to this Court granting the requested writ of certiorari for the following reasons, to-wit:

I. The question presented by the petition is not expressed in the terms and circumstances of the facts of this case as required by Rule 23 (c) of the Supreme Court of the United States.

II. The form of the question presented by the petition is misleading as to issues in this case.

III. This Court could not change the decision in this case unless it first overturned questions of fact decided against the petitioner by the Board, the District Court and the United States Court of Appeals for the Fifth Circuit.

IV. The decision in this case does not conflict with decisions of this Court and other federal courts.

V. The decision in this case involves only the assertion by the petitioner that he was not rehired for a constitutionally impermissible reason and the petitioner failed to prove his assertion. The decision in the case does not jeopardize the employment of school administrators and teachers.

VI. The decisions in this case were right in the Courts below.

The respondents will first reply to the petition as filed, to-wit:

OPINIONS BELOW

The respondents admit to the recitations under this heading in the petition

JURISDICTION

The respondents admit to the recitations under this heading in the petition.

The respondents deny that this Court should assume jurisdiction of this case for the reason that the decisions of the lower courts are not in conflict with the decisions of this Court and other federal courts.

QUESTION PRESENTED

The respondents deny that the question presented by the petition is expressed in the terms and circumstances of the facts of this case as required by Rule 23 (c) of the Supreme Court of the United States.

The respondents respectfully submit that the question presented is factually erroneous in the following particulars: (a) the board did not discharge the petitioner; (b) the petitioner's written contract of employment expired by its own terms; (c) the superintendent of education is vested by state law with the sole discretion and authority to recommend each year to the Board his nominee to serve as principal for the ensuing scholastic year; (d) the superintendent of education, in

the exercise of the sole independent professional judgment and discretion vested in him by state law, did not recommend the petitioner to the Board for renewal of his contract for the 1973-74 school year; (e) absent the initial recommendation of the petitioner to the Board by the superintendent of education the Board was powerless to renew the petitioner's contract of employment; (f) the fact that there was substantial community opposition to the renewal of petitioner's contract of employment was not the sole reason the superintendent of education did not recommend to the board the renewal of petitioner's contract of employment; and, (g) the decision of the superintendent of education not to recommend the petitioner to the Board for renewal of petitioner's contract was based upon substantial community opposition which was unrelated to his efforts to comply with court ordered desegregation.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The respondents admit that the constitutional and statutory provisions are correctly cited and reported.

STATEMENT OF THE CASE

The Leake County, Mississippi, school district encompasses the entire geographical area of Leake County, Mississippi.

Under Mississippi statutory law the Leake County, Mississippi, board of education consists of five members, each of

whom is elected by popular vote of the qualified electors of the school district. Each member is elected for a five year term and one member must be elected from each of the five beats (geographical districts) within the county.

Under Mississippi statutory law the superintendent of education of the Leake County, Mississippi, school district is an elected official and he is elected by popular vote of the entire Leake County, Mississippi, school district for a four year term.

The Respondent Price was elected by popular vote in the general election held in the year 1971 as the superintendent of education of the Leake County, Mississippi, school district and he assumed the duties of his office on the first Monday in January, 1972, commencing the four year term for which he had been duly elected.

The Leake County, Mississippi, school district has several separate attendance centers (schools), including the Edinburg Attendance Center which serves students in grades one through twelve.

The school year in the Leake County school district runs from July 1 through June 30 of each year. Principals for the several attendance centers are selected and employed to serve for one school year at a time. The Mississippi statutory law which governs the employment of attendance center principals under the facts in this case is Section 37-9-15 of the Mississippi Code of 1972 which reads as follows:

"§ 37-9-15. Selection of principals.

As soon as possible after the 15th day of January, and in no event later than the 15th day of February of each year, the superintendent of each school district shall recommend to the board of trustees thereof the principals to be employed for each of the schools of the districts except in the case of those principals who have been previously employed and who have a contract valid for the ensuing scholastic year. Unless good reason to the contrary exists, the board of trustees of the district shall approve and authorize the employment of the principals so recommended. If, for any reason, the board of trustees of any school district shall decline to approve a principal so recommended the superintendent shall make additional recommendations for the place or places to be filled. . . ."

The Petitioner Callahan was employed by the Leake County school district for three successive one-year each contracts as principal of the Edinburg Attendance Center as hereinafter stated more specifically.

The Leake County Superintendent of Education recommended to the Leake County Board of Education the name of Petitioner Callahan for the position of principal of the Edinburg Attendance Center for the next ensuing school year beginning July 1, 1970, and ending on June 30, 1971. The Leake County Board of Education approved the recommendation and Petitioner Callahan

did serve as said principal for the 1970-71 school year.

Between January 15, 1971, and February 15, 1971, according to the state statutory requirements, the Leake County Superintendent of Education recommended to the Leake County Board of Education the name of Petitioner Callahan for the position of principal of the Edinburg Attendance Center for the next ensuing school year beginning on July 1, 1971, and ending on June 30, 1972. The Leake County Board of Education approved the recommendation and Petitioner Callahan did serve as said principal for the 1971-72 school year.

Between January 15, 1972, and February 15, 1972, according to state statutory requirements, the Respondent Price, acting as Leake County Superintendent of Education, recommended to the Leake County Board of Education the name of Petitioner Callahan for the position of principal of the Edinburg Attendance Center for the next ensuing school year beginning on July 1, 1972, and ending on June 30, 1973. The Leake County Board of Education approved the recommendation and Petitioner Callahan did serve as said principal for the 1972-73 school year.

The above referenced employment contracts were fully performed by the Leake County school district as employer and by Petitioner Callahan as employee and each expired by its own terms.

The Respondent Price, in the exercise of his professional judgment and discretion and pursuant to the statutory trust and

authority vested in him as Leake County Superintendent of Education, did not recommend to the Leake County Board of Education, between January 15, 1973, and February 15, 1973, the name of Petitioner Callahan to serve as principal of the Edinburg Attendance Center for the next ensuing school year.

The Respondent Price wrote Petitioner Callahan a letter on January 18, 1973, informing Petitioner Callahan that he would not be recommended for rehiring and the content of the letter is as follows:

> " As you know, I am greatly concerned about the eudational system of Leake County, including Edinburg Center, it's staff, pupils and patrons.
>
> I have given the situation that exists there very much thought and consideration, and have decided that it is for the best interest of the school and the children that I should not recommend you to the Leake County School Board for re-employment as Principal, after your present contract expires, for the 1973-74 school term.
>
> My reason for not recommending you is that under the conditions that exist at the Edinburg Center, tensions are so high among patrons, teachers and students, that you cannot have the type of school and education that the pupils of the community are entitled to and deserve.

> This decision was made entirely for the best interest of the school and for no other reasons."

Petitioner Callahan filed this law suit on April 2, 1973, while serving the unexpired portion of his employment contract for the 1972-73 school year; and, he finished the remaining term of said contract.

Petitioner Callahan asserted in his law suit that the community opposition to his being rehired by the school district was based upon his enforcement of court-ordered desegregation. The Respondent Superintendent of Education Price, who made the initial decision not to recommend Petitioner Callahan for rehiring, claimed that the community opposition was not racially motivated. The Leake County Board of Education, after an extensive hearing, agreed. The district court upheld the decision of the board. The United States Court of Appeals for the Fifth Circuit held that the findings and conclusions of the district court were supported by substantial evidence and were not clearly erroneous.

The United States Court of Appeals for the Fifth Circuit in deciding this case said:

> " We affirm the district court's decision, not by deciding the serious legal questions posed by Callahan, but on the ground that the findings of the district court are not clearly erroneous and the facts do not support Callahan's

claim that he was dismissed for constitutionally impermissible reasons. The key to any possible relief claimed by plaintiff lies in the reason for the community opposition to him and its effect. In a case of this kind, the burden of proof is on the plaintiff to show that the conduct of the school authorities was unconstitutional.

The facts found by both the school board after extensive hearings, and the district court after evidentiary hearings and examination of the transcript before the school board, show that the plaintiff failed to prove that the community opposition was based on his enforcement of court-ordered desegregation." (App. pg. 2a).

REASONS WHY THIS COURT SHOULD NOT GRANT CERTIORARI AND ARGUMENT IN SUPPORT OF SAID REASONS

I.

The question presented by the petition is not expressed in the terms and circumstances of the facts of this case as required by Rule 23 (c) of the Supreme Court of the United States.

The petition has presented by his petition the following question:

> "Whether the First and Fourteenth Amendments and 42 U.S.C. § 1983 prohibit a school board from discharing a principal for the sole reason that there was community opposition to the principal, when that opposition was based in part on racial hostility and opposition to the principal's implementation of court-ordered desegregation."

The respondents respectfully submit that the question posed is factually erroneous in the following particulars:

(a) The Board did not discharge the petitioner; and,

(b) The petitioner's written contract of employment expired by its own terms.

> The petitioner is a non-tenured school principal (App. A pg. 1a) and his written contract of employment expired by its own terms on June 30, 1973 (App. A pg. 7a).

(c) The superintendent of education is vested by state law with the sole discretion and authority to recommend each year to the Board his nominee to serve as principal for the ensuing scholastic year; and,

(d) The superintendent of education, in the exercise of the sole independent professional judgment and discretion vested in him by state law, did not recommend the petitioner to the Board for renewal of his contract for the 1973-74 school year; and,

(e) Absent the initial recommendation of the petitioner to the Board by the Superintendent of education the Board was powerless to renew the petitioner's contract of employment.

> (App. A pg. 5a). Under Mississippi statutory law, Section 37-9-15, supra, the superintendent has the sole professional duty and responsibility to choose, select and recommend his nominee to the board for the position of attendance center principal. If the recommendation of the superintendent meets with the approval of the board, then the superintendent is empowered to enter into a written contract with the principal on behalf of the school district. Unless the superintendent initiates the recommendation, the board is powerless to act. The superintendent has the sole and exclusive recommending power for the appointment of principals. Lott v. State ex rel Kelly, 239 Miss. 97, 121 So.2d 402 (1960); Henry v. Coahoma County Board of Education, 246 F.Supp. 517 (1963), affirmed 353 F.2d 648 (1965).

(f) The fact that there was substantial community opposition to the renewal of petitioner's contract of employment was not the sole reason the superintendent of education did not

recommend to the board the renewal of petitioner's contract of employment.

> (App. D pg. 17a). The trial court specifically found as follows: ". . .that there was in fact substantial opposition among the parents of students attending Edinburg Attendance Center to the re-employment of the plaintiff as school principal and that because of this substantial opposition, his re-employment as school principal would not be in the best interest of public schools at Edinburg Attendance Center. . ."

(g) The decision of the superintendent of education not to recommend the petitioner to the Board for renewal of petitioner's contract was based upon substantial community opposition which was unrelated to his efforts to comply with court-ordered desegregation.

> (App. A pg. 8a). The Court of Appeals specifically found as follows: ". . .The record contains substantial evidence to support the findings that, despite such racially motivated opposition, Superintendent Price's decision not to re-employ Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation. . ."

The respondents respectfully submit that the petitioner has misapprehended the

facts established in the proceedings below; and, that this court should not grant certiorari based upon the question presented with its embedded factual errors.

II.

The form of the question presented by the petition is misleading as to issues in this case.

The respondents would respectfully show unto the Court that the form and content of the question presented assumes that the board, the district court and the court of appeals made a factual determination that the failure to renew the petitioner's contract of employment was based upon community opposition; that some of the community opposition was based upon efforts of the petitioner to enforce court-ordered desegregation; and, that the board, the district court and the court of appeals made no determination that Superintendent Price's decision not to recommend Callahan for re-employment was based on considerations and opposition unrelated to any efforts of the petitioner to comply with court-ordered desegregation.

An examination of the proceedings below completely refutes such assumption. The board made a specific finding on this point which is set forth as follows:

> (App. G pg. 27a) ". . .We find that there is very little, if any, racial hostility in the Edinburg school community directed toward Mr. Leroy Callahan; and, that this was not a

> factor in the decision of Mr. H. M. Price not to recommend Mr. Leroy Callahan as attendance center principal.
>
> We further find that the administration of Edinburg Attendance Center by Mr. Leroy Callahan on a fully unitary non-discriminatory basis was not the reason for the substantial opposition to Mr. Callahan in the Edinburg Attendance Center community. . ."

The Court of Appeals below, speaking of the hearing before the board at which the above factual determination was made by the board, stated as follows:

> ". . .It is not questioned that this hearing afforded Callahan all of the procedural due process contemplated by the Fourteenth Amendment. Ferguson v. Thomas, 430 F.2d 852, 856 (5th Cir. 1970); cf. Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961). . . ." (App. A pg. 6a).

The Court of Appeals below, still speaking of the board hearing, further observed as follows:

> ". . .A school board hearing procedure which is conducted in accordance with the dictates of procedural due process is entitled to great weight. If substantial evidence appears to support the school board's action that should end the matter. The court should never substitute its judgment for

that of the Board. Toups v. Authement, 496 F.2d 700 (5th Cir. 1974); Thompson v. Madison County Board of Education, 476 F.2d 676 (5th Cir. 1973). . ." (App. A pg. 7a).

The district court specifically considered the transcript of the hearing before the board and the Findings and Conclusions of the board together with the testimony of witnesses appearing in the hearing before the district court and concluded and found as follows:

". . .This Court, having carefully examined all the evidence in this case, including the transcript of the hearing before the Leake County Board of Education, the Findings and Conclusions of this Board and the testimony of the witnesses appearing at the hearing held in this matter on July 10, 1973, finds and is of the opinion that the decision not to re-employ the plaintiff as principal of the Edinburg Attendance Center for the scholastic year 1973-1974 was not based on any constitutionally impermissible ground but solely upon the determination by the Superintendent of Education of Leake County, Mississippi, Mr. H. M. Price, that there was in fact substantial opposition among the parents of students attending Edinburg Attendance Center to the re-employment of the plaintiff as school principal and that because of this substantial opposition, his re-employment as school principal would not be in the

best interest of public schools at edinburg Attendance Center. . ." (App. D pg.17a).

Thus the case reached the Court of Appeals below buttressed by the initial determination of the board and the subsequent determination by the district court that there was no impermissible constitutional reason involved in Superintendent Price's decision not to recommend petitioner for contract renewal.

The Court of Appeals below very discerningly defined its duty in this case to be as follows:

". . .On this appeal, our review is limited to examining the record to ascertain whether there was substantial evidence to support the finding of the Board and the district court that the nonrenewal of Callahan's contract was due to substantial community opposition which was unrelated to his efforts to comply with court-ordered desegregation. . ." (App. A pg. 7a).

The Court of Appeals below, after having stated the question to itself, proceeded to reason and find as follows:

". . .The record contains substantial evidence to support the findings that, despite such racially motivated opposition, Superintendent Price's decision not to reemploy Callahan was based on considerations and opposition unrelated to any efforts of the principal to comply with court-ordered desegregation.

> Plaintiff simply failed to satisfy his burden of proving that the community opposition and the Superintendent's decision not to reemploy him was due to his interest in maintaining an integrated school.
>
> . . .
>
> The findings and conclusions of the district court are supported by substantial evidence and are not clearly erroneous under F.R.Civ.P. 52(a)." (App. A pg. 8a and 9a).

Thus, the respondents would respectfully urge unto the Court that the board, the district court and the Court of Appeals have all determined that the action of the Respondent Price in deciding not to recommend petitioner for reemployment was based upon considerations and opposition totally unrelated to any efforts of the petitioner to comply with court-ordered desegregation.

III.

This Court could not change the decision in this case unless it first overturned questions of fact decided against the petitioner by the Board, the District Court and the United States Court of Appeals for the Fifth Circuit.

For the purpose of argument under this point the respondents refer to the factual determinations of the Board, the District Court and the Court of Appeals below that are set forth in detail under II above.

The respondents would respectfully show unto the Court that the Board, the District

Court and the Court of Appeals below have searched, examined and probed through conflicting claims as to the underlying reasons why Respondent Price did not recommend the petitioner for renewal of his contract. In addition, the petitioner urged for a rehearing and for a rehearing en banc in the Court of Appeals below and all of his claims have been resolved against him.

It is respectfully submitted that there is no way in which this Court could grant the relief sought by the petitioner without first becoming a super-fact finding body and overturning factual determinations that have been painstakingly arrived at by the Board, the District Court and the Court of Appeals below.

Respondents further respectfully submit that the special competence of this Court should be confined to that of questions of law and not of fact.

IV.

The decision in this case does not conflict with decisions of this Court and other federal courts.

The respondents, by and through their attorneys, respectfully submit unto the Court that one of said attorneys has closely read and examined each of the decisions cited by the petitioner in his petition for a writ of certiorari in this case. The said attorneys would respectfully submit unto the Court that respondents have no quarrel with the law as set

forth in the decisions of this Court and other federal courts in the petition; however, the attorneys for the respondents respectfully urge upon the Court that the cases cited simply miss the mark insofar as the facts as determined by the lower courts in this case are concerned. There is no finding of fact in the courts below that the respondents have bowed to community pressure based upon opposition to court-ordered desegregation. The finding of fact in the courts below amply support Respondent Superintendent Price's contention that his decision was based upon considerations and opposition totally unrelated to any efforts of the petitioner to comply with court-ordered desegregation.

V.

The decision in this case involves only the assertion by the petitioner that he was not rehired for a constitutionally impermissible reason and the petitioner failed to prove his assertion. The decision in the case does not jeopardize the employment of school administrators and teachers.

The respondents would respectfully submit unto the Court that the Court should take judicial knowledge of the fact that it is virtually impossible to find a school related controversy, such as this case, that is sterile of racial discrimination claims. Respondents would further submit that this controversy between the petitioner and the respondents has been fully developed factually before the board and the district court and that in

weighing and winnowing process the petitioner has simply failed to carry the burden of proof that his contract was not renewed for a constitutionally impermissible reason.

The respondents therefore urge upon the Court that any time a teacher or administrator asserts that he was not rehired for constitutionally impermissible reasons the board and the district court must find the facts as to such claims. Therefore, this decision in the courts below is simply a common garden variety type of law suit in the sense that the board and the district court had to find the facts from among the competing claims and contradictory evidence. The same process must be indulged in each time such a claim is asserted by a teacher or administrator. Therefore, the decision in the lower courts in this case does not jeopardize the employment of school administrators and teachers.

VI.

The decisions in this case were right in the Courts below.

The respondents respectfully submit that under a long line of decisions of this Court the rule has been recognized that where factual determinations have been concurred in by two lower courts, the Supreme Court will not look over the shoulder of the lower courts and substitute its judgment in the absence of a clear and strong showing of apparent error in the courts below.

The respondents submit that based upon the fact finding determinations by the board, the district court and the concurrance of the Court of Appeals below in such fact finding determinations, the decisions below were fair, equitable and right.

And finally, the respondents would urge that the fact finding determinations in the proceedings below that Respondent Superintendent Price's decision not to recommend Petitioner Callahan for rehiring was based upon considerations and opposition totally unrelated to any efforts of the petitioner to comply with court-ordered desegregation preclude the involvement of any constitutional violation by the respondents. Hence, absent of fact finding determination to the contrary by this Court, this Court has no jurisdiction over the matter.

CONCLUSION

For all of the foregoing reasons and arguments, the petition for writ of certiorari should not be granted.

Respectfully submitted,

September 29, 1975

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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Petitioner,

v.

SUPERINTENDENT OF EDUCATION OF LEAKE COUNTY, MISSISSIPPI, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioner Callahan files this reply to respondents' brief in opposition for the purpose of showing that respondents' brief (1) fails to respond to or even mention the conclusion of the Court of Appeals on rehearing that the community opposition to Callahan was based in part on race, (2) mistakenly characterizes the district court's conclusory findings, and (3) concentrates on tangential matters of school board procedure which have no bearing upon the worthiness of this case for certiorari.

1. Respondents' brief in opposition makes no reference to the existence or contents of the Court of Appeals' opinion on rehearing. While respondents cite often to the Court of Appeals' first opinion, which respondents and the Court conceded was based on a misapprehension of the facts (App. B, p. 11a), respondents ignore the Court of Appeals' critical conclusion, based on reconsideration of the facts, that "in the correct view of the facts, the unpopularity [of Callahan] because of the run-in with the football coach and other teachers was exacerbated by his activities in relation to the black students" (App. B, p. 13a). The Court below could not conclude otherwise in light of the facts reviewed and recited on reconsideration (App. B, pp. 11a-12a).

2. Respondents' brief also perpetuates and enlarges upon the Court of Appeals' erroneous reading of the District Court's findings. Respondents state that the District Court, *inter alia*, "determined that the action of the Respondent Price in deciding not to recommend petitioner for reemployment was based upon considerations and opposition totally unrelated to any efforts of the petitioner to comply with court-ordered desegregation" (Br. in Opp. 18).

The District Court, however, did not so find. The Court said that the "decision not to re-employ the plaintiff as principal . . . was not based on any constitutionally impermissible ground but solely upon the determination by the Superintendent . . . that there was in fact substantial opposition among the parents of students . . . to the re-employment of the plaintiff . . . and that because of this substantial opposition, his re-employment . . . would not be in the best interest of public schools . . ." (App. D, p. 17a). The District Court's statement does not contain a finding that the "substantial opposition" to Callahan was free of racial hostility. Certainly the statement does not find or suggest that the

Superintendent was able to or in fact did separate the racially hostile opposition from the racially neutral opposition and base his decision solely upon the latter grounds. As we read the District Court's statement, the Court found only that the Superintendent's decision to terminate Callahan was not inspired by any racial motives of the Superintendent but was based solely on the "substantial" community opposition to Callahan. Since the District Court made no specific finding on the extent to which that community opposition was motivated by race, that Court manifestly concluded that substantial community opposition, irrespective of its racial content, was a constitutionally permissible basis for terminating petitioner.

The Court of Appeals appears to have read the District Court's decision—as do respondents now—as finding as a matter of fact that the Superintendent based his decision only on that part of the community opposition that was not racially motivated (App. B, p. 12a). As indicated, this construction of the District Court decision is erroneous. Further, the Court of Appeals did not, and on the basis of the record could not, independently find that the Superintendent relied only on racially neutral opposition. Thus, the question set forth in the petition is squarely presented.

3. Respondents also claim that the question presented in Callahan's petition is factually erroneous in two other respects. First, they claim that petitioner Callahan was not terminated by the "Board" but rather by the "Superintendent" (Br. in Opp. 11-12). Respondents state that pursuant to Mississippi law the Board, in the absence of an affirmative recommendation from the Superintendent, was powerless to take any action respecting Callahan's employment (*id.* at 12). Respondents' argument overlooks the fact that the District Court ordered the Board to hear and determine Callahan's claims that he was being terminated on the basis of racially hostile

community opposition to him. The Board held such a hearing and affirmed the Superintendent's action. Thus, in our view, the Board terminated petitioner. This facet of the case, however, is immaterial since respondents' claim, if correct, does no more than focus the legal issue presented on whether Superintendent Price, a respondent herein, was barred by the Constitution from terminating petitioner solely on the basis of community opposition based in part on race.

Second, respondents claim that the Superintendent did not "discharge" Callahan but rather decided not to renew his contract. Whether one labels the termination a "discharge" or a "decision not to renew," the essential question remains—may a state official make such an employment decision solely on the basis of community opposition that is in part racially motivated?[1] The question is squarely presented by the record for the Superintendent testified that Callahan is "very capable and qualified to run a school" (Tr. 25) and that in the absence of community opposition "I would have recommended him I am sure, just like I had the first year I was in office" (Tr. 17).

[1] It is well established that the Equal Protection Clause bars public officials from refusing to hire applicants on account of race just as it bars public officials from firing employees on account of race. *E.g., Wall* v. *Stanly County Board of Education*, 378 F.2d 275, 277 (4th Cir. 1967); *Rolfe* v. *County Board of Education*, 391 F.2d 77, 79 (6th Cir. 1968); *Castro* v. *Beecher*, 459 F.2d 725, 733 (1st Cir. 1972). Cf. *Perry* v. *Sindermann*, 408 U.S. 593, 596 (1972) (lack of contractual right to re-employment does not defeat claim that nonrenewal of contract violated First Amendment).

Respectfully submitted,

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